Mad Yaacob bin Ismail & Ors v Kerajaan Negeri Kelantan & Anor

HIGH COURT (KOTA BHARU) — ORIGINATING MOTION NO MT(3) 25–32 OF 2000
SURIYADI J
25 FEBRUARY 2001

Islamic Law *— Syariah Court — Jurisdiction — Apostasy — Whether Syariah Court without jurisdiction once applicants apostatized — Whether declaration of apostasy per se sufficient to accept applicants as non-Muslim — Applicants not confirmed as non-Muslim, whether fell within Syariah Court jurisdiction — Whether habeas corpus could be granted to person serving sentence passed by Syariah Court*

The applicants had been convicted and sentenced to imprisonment by the Syariah High Court. Prior to the conviction and sentencing, the applicants had confessed in open court that with effect from 16 August 1998 they had already apostatized. The applicants applied for a writ of habeas corpus. It was submitted that the Syariah High Court was without jurisdiction to deal with them the moment they apostatized.

Held, dismissing the application:

(1) With the promulgation of the provisions of ss 8(1) and 9(1) of Enakmen Pentadbiran Mahkamah Syariah 1982, it is clear that the Syariah Court is a competent court endorsed with the necessary powers to deal with the matters at hand. It is also trite law that a writ of habeas corpus cannot be granted to a person serving sentence passed by a court of competent jurisdiction (see p 183B–C).

(2) The declaration of apostasy per se is insufficient ground from the point of law to accept them as non-Muslims. Section 102(1) of Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 provides that no person who is confirmed a Muslim, may admit that he is a non-Muslim unless confirmed by the Syariah Court. Under s 102(2) a person is deemed a Muslim until confirmed by the Syariah Court as having apostatized. Since the applicants had not been confirmed as non-Muslims, and being Muslims still at the material time, they certainly fell within the jurisdiction of the Kelantan Syariah High Court (see pp 183I, 184B, C).

[**Bahasa Malaysia summary**

Pemohon-pemohon telah disabit dan dihukum penjara oleh Mahkamah Tinggi Syariah. Sebelum sabitan dan hukuman tersebut dijatuhkan, pemohon-pemohon telah membuat pengakuan di mahkamah terbuka di mana bermula kuatkuasa 16 Ogos 1998 mereka telahpun murtad. Pemohon-pemohon telah membuat permohonan

untuk satu writ habeas corpus. Adalah dihujahkan bahawa Mahkamah Tinggi Syariah tidak mempunyai bidang kuasa untuk mengendalikan kes mereka mulai saat mereka murtad.

Diputuskan, menolak permohonan tersebut:

(1) Dengan pengisytiharan peruntukan ss 8(1) dan 9(1) Enakmen Pentadbiran Mahkamah Syariah 1982, adalah jelas bahawa mahkamah syariah merupakan mahkamah yang kompeten yang diindorskan dengan kuasa-kuasa yang perlu untuk mengendalikan perkara-perkara sebegini. Adalah juga undang-undang penting bahawa satu writ habeas corpus tidak boleh diberikan kepada seseorang yang sedang menjalankan hukuman yang dijatuhkan oleh mahkamah yang mempunyai bidang kuasa yang kompeten (lihat ms 183B–C).

(2) Deklarasi murtad per se bukan alasan yang mencukupi dari aspek undang-undang untuk menerima mereka sebagai bukan Muslim. Seksyen 102(1) Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 memperuntukkan bahawa tiada seseorangpun yang merupakan seorang Muslim yang sah, boleh mengakui bahawa beliau bukan seorang Muslim kecuali jika disahkan oleh Mahkamah Syariah. Di bawah s 102(2) seseorang adalah dianggap seorang Muslim sehingga disahkan oleh mahkamah syariah bahawa beliau telah murtad. Memandangkan pemohon-pemohon tidak lagi disahkan sebagai bukan Muslim, dan sememangnya masih sebagai orang Muslim pada masa matan tersebut, mereka sudah tentu jatuh di bawah bidang kuasa Mahkamah Tinggi Syariah Kelantan (lihat ms 183I, 184B, C).]

Notes

For cases on jurisdiction of Syariah Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 587–590.

Cases referred to

Corke, Ex parte [1954] 2 All ER 440 (refd)
Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 2 MLJ 425 (refd)
Gurbachan Singh's Application, Re [1967] 1 MLJ 74 (refd)
Gurdit Singh, Re [1933] MLJ 224 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)
Mohd Shahriman Mohd Khairil v PP & Anor [1998] 2 CLJ 855 (refd)
Ng Siew Pian v Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain [1992] 2 MLJ 425 (refd)
Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor [1997] 1 MLJ 537 (refd)
Ramah bte Taat v Laton bte Malim Sutan (1927) 6 FMSLR 128 (refd)

Legislation referred to

Criminal Procedure Code Chapter XXXVI
Courts of Judicature Act 1964 s 25
Enakmen Acara Jenayah Syariah No 9/83 s 132(1)
Enakmen Pentadbiran Mahkamah Syariah 1982 ss 8(1), 9(1)
Federal Constitution arts 5(2), 74, 95B(1)(a), 121(1A), State List
Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1966 (Pin 8/86) s 132(1)
Undang-Undang Majlis Agama Islam Kelantan dan Adat Istiadat Melayu Bil 2.66

Jahaberdeen Mohamad Yunoos (*Haris bin Ibrahim* and *Mohana Kumar* with him) (*Jahaberdeen & Ngo*) for the applicants.

Azahar bin Mohamed (Deputy Public Prosecutor) for the Prisons Department.

Suriyadi J:. The brief facts revealed that the applicants had been initially charged and convicted at the Syariah High Court Kelantan for the offence of heresay. The relevant provision under which they were charged was s 69 of the Undang-Undang Majlis Agama Islam Kelantan dan Adat Istiadat Melayu Bil 2.66. Each received the sentence of 20 months imprisonment. Appeals were accordingly filed by the applicants but met with scant success, except for the fact that the Religious Court of Appeal (Mahkamah Rayuan Syariah) had varied the sentences. Under this new varied sentence, the applicants were each required to furnish a bond of RM5,000, and to be on good subsequent behaviour. Apart from that the applicants were required to appear at the Kadi's Court every month for three years, whereupon they were to repent (melafazkan taubat). Unfortunately, as they had failed to acquiesce to the new conditions, the applicants were thereupon charged with fresh charges ('the new charges'), culminating in their convictions and imprisonment of three years each.

The facts further revealed that prior to the conviction and sentencing of the applicants under the new charges on 19 November 2000, the applicants had confessed in open court on 12 November 1998 that with effect from 16 August 1998, they had already apostatized. Pursuant to these confessions, the relevant religious department had preferred charges against them through a notice of motion, founded under s 132(1) of the Enakmen Acara Jenayah Syariah No 9/83, read together with s 69 of the Undang-Undang Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1966 (Pin 8/86). These apostasy charges are yet to be heard, and not directly relevant to these applications except for the confessions which were the very foundation of the complaints of the applicants, vis-a-vis the current applications. Came the fateful day of 19 November 2000, the charging, finding of guilt, convictions and sentencing on the new charges were still proceeded with, even though the presiding judge had already been informed seven days earlier of their renunciation of the religion of Islam, through that said confessions. The applicants filed no appeals as against the outcome of these new charges. They had instead opted for writs of habeas corpus before me.

It was quite clear to me that the relevant question to be resolved was whether writs of habeas corpus could be issued by the court in the circumstances of the case, in the light of the applicants challenging the jurisdiction of the Syariah High Court judge, whence the latter had already known that they had confessed to having apostatized. To resolve this poser, it was beyond doubt that the Federal Constitution must take centre stage and requiring some discussion (*Mohd Shahriman Mohd Khairil v PP & Anor* [1998] 2 CLJ 855). Under art 5(2) of the Federal Constitution ('the Constitution') is enshrined of the rights of a person not to be deprived of his life or personal liberty, save and in accordance with the law. A High Court judge on receipt of a complaint of being unlawfully detained shall enquire into that complaint and, unless satisfied that the detention is lawful, order him to be produced before the court and thenceforth release him. Under s 25 of the Courts of Judicature Act 1964 and Chapter XXXVI of the Criminal Procedure Code are promulgated the necessary powers for the judge to deal with the matters at hand.

To reiterate, to be successful in their endeavour before me, the applicants must prove, in a gist, that their detentions were unlawful. To resolve this imperative point I need at the outset too to clarify that on matters connected to religion, a dividing line exists in Malaysia for those who practise and profess Islam and those who do not. Under A704 of 1988, effective 10 June 1988, art 121(1A) of the Constitution was promulgated whereby the High Courts in Malaya and Sabah and Sarawak were ousted over matters which fell within the jurisdiction of the Syariah Court. Under List 11, State List (arts 74, 95B(1)(a)), the Constitution delineates the powers of the latter court over persons professing the religion of Islam (*Ramah bte Taat v Laton bte Malim Sutan* (1927) 6 FMSLR 128; *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 2 MLJ 425; *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793; *Ng Siew Pian v Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain* [1992] 2 MLJ 425).

To zero in on the matter at hand, I had to decide, inter alia, whether the applicant had been incarcerated pursuant to a good order, and from a competent forum or court. In other words, I had to make a finding of fact whether their detentions were legal. Having scrutinized the affidavits of the applicants, with particular reference to para 19, I could not avoid deciding that they had been. I conducted thus as the very court which dealt with them had been set up in accordance with the provisions of Enakmen Pentadbiran Mahkamah Syariah 1982 ('the Enakmen'). Section 8(1) of the Enakmen reads:

> Ke bawah Duli Yang Maha Mulia Al-Sultan bolehlah melalui pemberitahu dalam warta menubuhkan:
>
> (a) Mahkamah Rayuan Syariah;
>
> (b) Mahkamah Tinggi Syariah; atau
>
> (c) Mahkamah Rendah Syariah;
>
> di mana-mana tempat yang difikir patut dan bolehlah menentukan kehendak bidang kuasa Mahkamah-Mahkamah yang demikian.

Section 9(1) of the Enakmen provides for the powers of the Syariah High Court judge, and it reads:

> Dalam bidang kuasa jenayahnya, membicarakan mana-mana kesalahan yang dilakukan oleh seseorang Islam dan yang boleh dihukum di bawah Enakmen ini atau mana-mana undang-undang bertulis yang telah diperuntukkan baginya dan bolehlah mengenakan apa-apa hukuman yang telahpun diperintahkan baginya.

With the promulgation of the above provisions, it was clear to me that the Syariah Court was a competent court, endowed with the necessary powers to deal with the matters at hand.

It is also trite law that a writ of habeas corpus cannot be granted to a person serving sentence passed by a court of competent jurisdiction (*Re Gurbachan Singh's application* [1967] 1 MLJ 74; *Re Gurdit Singh* [1933] MLJ 224). The fact that the applicants never filed any appeal against the outcome of the new charges will not attract the sympathy of any court, as a writ of habeas corpus cannot be used as a means of appeal from a sentence passed by a competent court (*Ex parte Corke* [1954] 2 All ER 440). In fact the attempts by the applicants to challenge the validity of another competent court by this technique, ie by filing this habeas corpus action surely must meet the wrath of the court. *Halsbury Laws of England* (3rd Ed) Vol 11 at pp 35–36 had occasion to author:

> The writ will not be granted to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course.
>
> *The writ of habeas corpus will not be granted where the effect of it would be to review the judgment … .* (Emphasis added.)

In *Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537, KC Vohrah J had opined at p 542 that:

> … [*The*] *High Court cannot, in a habeas corpus application under s 365 of the Code, review or, question the validity of a subsisting order made by a Syariah Court which was a court of competent jurisdiction*. And in any event, this court by virtue of art 121(1A) of the Constitution has no jurisdiction to question an order made in respect of a matter where the Syariah High Court, a creature of a written law, has jurisdiction given to it under a written law. This court has to accept the Syariah High Court order as a valid order. (Emphasis added.)

Be that as it may, according to the affidavits of the applicants, the Syariah High Court was without jurisdiction to deal with them the moment they apostatized, effective 16 August 1998. I have dealt with this legal poser in some depth in Originating Summons Nos 24–319, 320, 321, 322 of 2000, but due to necessity, I herewith reproduce a brief resume of the findings. To avoid any misunderstanding, I need to state that I still stand by my views as stated in the abovementioned originating summons, where I had concluded that the declaration of apostasy per se, was insufficient ground from the point of law, to accept them as non-Muslims. The reasons supplied, and needless to say still applicable, are as follows.

Seksyen 102(1) of the Enakmen Majlis Agama Islam dan Adat Istiadat Melayu Kelantan 1994 ('the Kelantan Enakmen') in brief reads:

> Tidak seorangpun yang telah diakui beragama Islam boleh mengaku bahawa dia bukan Islam melainkan setelah Mahkamah memberi pengesahan sedemikian.

In brief it provides that no person who is confirmed a Muslim, may admit that he is a non-Muslim unless confirmed by the Syariah Court. Under s 102(2) of the Kelantan Enakmen, a person is deemed a Muslim until confirmed by the Syariah Court as having apostatized. In the original text it reads:

> Sebelum Mahkamah membuat pengesahannya seseorang itu hendaklah dianggap beragama Islam dan segala perkara yang berkaitan dengan Agama Islam adalah terkena ke atasnya.

On those outputs, the applicants as they had not been confirmed as non-Muslims, and being Muslims still at the material time, certainly fell within the jurisdiction of the Kelantan Syariah High Court.

Based on all the above grounds, I had no hesitation in dismissing the habeas corpus applications by the applicants, as I found for a fact that their detention had been pursuant to orders made by a Syariah Court, which was a court of competent jurisdiction.

Application dismissed.

Reported by Jafisah Jaafar